

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

FEBRUARY 1997 SESSION

**FILED**  
March 19, 1997  
Cecil Crowson, Jr.  
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

VS.

DAVID McCLAIN,

Appellant.

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C.C.A. NO. 02C01-9601-CR-00042

SHELBY COUNTY

HON. CHRIS B. CRAFT,  
JUDGE

(Sentencing)

FOR THE APPELLANT:

FOR THE APPELLEE:

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(on appeal)

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OPINION FILED: \_\_\_\_\_

**AFFIRMED**

JOHN H. PEAY,  
Judge

OPINION

The defendant was indicted in March 1995 on one count of forgery, a Class E felony. He pled guilty to the charge and was sentenced as a Range III persistent offender to four years in the Shelby County Correctional Center. He petitioned the court to suspend the remainder of his sentence and place him on Community Corrections. The court denied his request and it is from this denial that he now appeals. After a review of the record, we find that the trial court was not in error, and we affirm the judgment below.

The defendant was indicted after attempting to pass a forged check at Sears in the amount of four hundred fifty-four dollars and sixty-three cents (\$454.63). He had created a check on a computer and had used a fictitious name as the holder of the account. The defendant then made out the check to Sears and signed the fictitious name to it in order to purchase a necklace.

The defendant now complains that the trial court erred by refusing to suspend the remainder of his sentence and place him on Community Corrections. When a defendant complains of his/her sentence, we must conduct a de novo review with a presumption of correctness. T.C.A. § 40-35-401(d). The burden of showing that the sentence is improper is upon the appealing party. T.C.A. § 40-35-401(d) Sentencing Commission Comments. This presumption, however, "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

The Community Corrections Act of 1985 establishes a community based alternative to incarceration for certain offenders and sets out the minimum eligibility requirements. T.C.A. §§ 40-36-101 through -306. This Act does not provide that all offenders who meet the standards are entitled to such relief. State v. Taylor, 744 S.W.2d

919, 922 (Tenn. Crim. App. 1987).

The purpose of the Tennessee Community Corrections Act of 1985 is to establish a policy to punish selected, nonviolent felony offenders through community-based alternatives to incarceration. The goals of the Community Corrections Act include the following: maintaining safe and efficient community correctional programs, promoting accountability of offenders to their local community, filling gaps in the local correctional system through the development of a range of sanctions and services, reducing the number of nonviolent felony offenders in correctional institutions and jails, and providing “opportunities for offenders demonstrating special needs to receive services which enhance their ability to provide for their families and become contributing members of their community . . . .” T.C.A. § 40-36-104(1)-(5).

Before one is entitled to community corrections, he or she must be eligible pursuant to T.C.A. § 40-36-106(a). Mere eligibility, of course, does not end the inquiry. We must also look to the Criminal Sentencing Reform Act of 1989. Under this Act, trial judges are encouraged to use alternatives to incarceration. T.C.A. § 40-35-102(6) states that “a defendant who does not fall within the parameters of subdivision (5) and who is an especially mitigated or standard offender convicted of a Class C, D or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary.” Militating against alternative sentencing are the following considerations:

Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct; [c]onfinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or [m]easures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant . . .

T.C.A. §40-35-103(1)(A)-(C). See also State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

In this case, the trial court denied Community Corrections based on the length of the defendant's criminal record and his inability to lead an honest life. The record supports this conclusion. The defendant has a criminal record that spans twenty-five years. He has been convicted of driving on a suspended license, reckless driving, forgery, uttering forged papers, driving under the influence, burglary, receiving stolen property, and other offenses. He has been incarcerated several times in the past including a recent twenty-one month sentence in federal prison for credit card fraud. Clearly, this defendant has little regard for obeying the law. Due to the defendant's criminal history and his failure to rehabilitate despite the numerous opportunities he has been given, we yield to the discretionary authority of the trial court. See State v. Franklin B. Caldwell, No. 01C01-9411-CC-00389, Marshall County, (Tenn. Crim. App. filed June 22, 1995, at Nashville).

Despite his criminal history, the defendant maintains that he should have been placed in Community Corrections under T.C.A. § 40-36-106(c) which provides that those offenders with histories of chronic alcohol abuse, drug abuse or mental health problems whose special needs are treatable and could be best served in the community may be eligible for Community Corrections under this section despite their ineligibility under T.C.A. § 40-36-106(a). However, the defendant has offered no proof that he is suffering from any of the above mentioned problems. In the presentence report, the defendant stated that he had no health or mental problems. While he did indicate that he thought he may have a drinking problem, this statement was not established with any further evidence. In fact, the trial judge stated, "I don't see that [the defendant] has an alcohol problem. I don't see that he has a drug problem. I see he just has an honesty

problem. And I'm not sure that that can be treated."

Thus, we conclude that the defendant has failed to carry his burden of demonstrating that the evidence preponderates against the trial court's findings and, therefore, the judgment below is affirmed.

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JOHN H. PEAY, Judge

CONCUR:

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JOE B. JONES, Judge

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JOE G. RILEY, Judge